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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-6913

ANDRE JONES,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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QUESTIONS PRESENTED FOR REVIEW

I. Whether The Illinois Death Penalty Statute Provides The Sentencing Authority With Constitutionally Sound Guidelines In Deciding Whether To Impose The Death Penalty.

II. Whether It is Unconstitutional For A Convicted Murderer To Be Sentenced To Death Based In Part On Factors Not Specifically Spelled Out In A State's Death Penalty Law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	3-12
REASONS FOR DENYING THE WRIT	
I. The Illinois Death Penalty Statute Provides The Sentencing Authority With Constitutionally Sound Guidelines In Deciding Whether To Impose The Death Sentence	13-21
II. Barclay v. Florida, 463 U.S. ___ (1983) Permits Factors Not Specifically Spelled Out In A State's Death Penalty Law To Be Considered As Reasons For Imposing The Death Sentence	21-22
CONCLUSION	22

TABLE OF AUTHORITIES

a. Cases

	Page
Gregg v. Georgia, 428 U.S. 153 (1976)	14
Zant v. Stephens, 33 Cr. L. 3195 (June 22, 1983)	15
Jarek v. Texas, 428 U.S. 262 (1976)	16
Adams v. Texas, 418 U.S. 38, 47 (1980)	17
United States v. Bruton, 391 U.S. 340 (1968)	19
Woodson v. North Carolina, 428 U.S. 280 (1976)	19
Lockett v. Ohio, 438 U.S. 586 (1978)	19
Barclay v. Florida, 463 U.S. ___ (1983)	21

b. Statutes

Ill. Rev. Stat., 1980, ch. 38, §9-1, et seq.	14

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 94 Ill.2d 275 (1982).

A copy of the opinion is appended to petitioner's petition as Appendix A.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as discussed more fully below, respondent submits that the petitioner has not shown

any reason for this Court to exercise its discretion to grant his petition for a writ of certiorari.

CONSTITUTIONAL PROVISIONS

Petitioner relies on the Sixth and Eighth Amendments to the Constitution of the United States, made applicable to the states pursuant to the Fourteenth Amendment.

STATEMENT OF THE CASE

THE VICTIMS

RICHARD STOLTZ

On the morning of April 30, 1979, petitioner and his girlfriend, Laurie Elem, left his house to go for a walk. Before leaving, however, he took his .22 caliber six-shot revolver and put it in his coat pocket. They walked to the Roosevelt Homes in East St. Louis, Illinois, where the petitioner's mother lived. He visited his mother while Laurie visited with a girlfriend. (R. 281). 1/

Later, the petitioner left and picked up Laurie. When he met Laurie she was in the company of her cousin, Freddie Tiller. 2/ The trio then walked from the Roosevelt Homes to a brickyard in the vicinity of 33rd and State Streets, where Freddie observed an old white man stacking bricks on the back of a pickup truck. This old white man was Richard Stoltz. (R. 281-282; C. 72).

Freddie asked the petitioner for his gun and stated that he was going to rob Mr. Stoltz. Laurie continued walking.

1/ For purposes of citation, references to the volume containing the common law record are designated "C. ___;" references to the volumes containing the verbatim transcript of the sentencing proceedings are designated "R. __."

2/ Freddie Tiller was indicted with the petitioner, but was tried separately.

The petitioner gave his gun to Freddie, who then announced the stickup to Mr. Stoltz. When Mr. Stoltz raised his hands into the air Freddie fired the gun, striking Mr. Stoltz in the left eye. Mr. Stoltz fell from the truck-dead. (R. 282, 285-287; C. 72).

While he lay there, Freddie robbed him of his wallet, keys and wristwatch. The petitioner and Freddie rejoined Laurie and continued their walk. (R. 282; C. 72).

SAMUEL NERSESIAN

The trio walked until they arrived at the Illinois Avenue Cleaners, where the petitioner told Laurie to go home. The petitioner then suggested that he and Freddie rob the cleaning store. Freddie agreed. After placing a ski mask over his head, the petitioner and Freddie entered the store. Once inside, the petitioner shot the proprietor in the head, as he was approaching them. The proprietor fell to the floor where the petitioner again shot him in the head. Samuel Nersesian was dead. (R. 282-283, 296-303; C. 73).

DEBRA BROWN

After shooting Samuel Nersesian, the petitioner opened the cash register and took an untold amount of money. As they were about to leave, a mail carrier arrived in a mail truck and entered the store. The petitioner, who was hiding

behind the door, grabbed her from behind and pushed her into a storage room at the rear of the store. There, he knocked her to the floor and shot her once in the chest. He then shot her again - in the mouth. Debra Brown was dead. (R. 283, 288-291; C. 73).

The petitioner and Freddie then left the store; the defendant walked across the street to his house and Freddie left in the mail truck. (R. 283-284; C. 73).

After conducting an investigation, the police arrested the petitioner on May 4, 1979. On that date, after being fully advised of his constitutional rights and waiving them, the petitioner confessed fully to the three killings. (R. 275-284).

Subsequently, the petitioner was indicted for murder, armed robbery and armed violence. (C. 19-23).

On August 23, 1979 he pleaded guilty to the three murder charges. (C. 58-83).

MICHAEL AND DORA WALLACE

On August 30, 1979, after the defendant pleaded guilty to the murders of Richard Stoltz, Samuel Nersesian and Debra Brown, Robert Miller, a detective from the St. Clair County, Illinois Sheriff's Office, interviewed Freddie Tiller

at the jail. The purpose of this interview was to determine whether Freddie Tiller had any knowledge of other unsolved crimes in the St. Clair County area. Freddie Tiller told Detective Miller that the petitioner might have been involved in some of those crimes. (C. 373-374).

Detective Miller then interviewed the petitioner. After being fully advised of his constitutional rights the petitioner waived them. (C. 374). The petitioner then expressed knowledge of other homicides in St. Clair County. While he did not provide any specific information regarding these homicides, he did tell Detective Miller that he made up his mind in prison that in the future he would "destroy" any victims or eyewitnesses to his crimes. He stated that his previous convictions resulted directly from victims or eyewitnesses who identified him and that he would never allow this to happen again. (R. 374-375).

Two days later, however, the petitioner requested to see Detective Miller. When Detective Miller met the petitioner he was given a six page handwritten confession. This confession described in detail how the petitioner had murdered Michael and Dora Wallace. Those murders had taken place on November 15, 1978, six and one-half weeks after the petitioner was released from prison and less than six months before the date of the April 30, 1979 murders of Richard Stoltz, Samuel Nersesian and Debra Brown. (R. 366, 375-377, 412-416).

In his confession, the petitioner related how on November 15, 1978 he had had an argument with his grandmother which upset him. To restrain himself from hurting his grandmother, he left the house. He stated that he had to find someone to impose his anger upon. He started to walk to his mother's house when he walked up to a white wooden house and knocked on the door. An old white man dressed only in his underwear answered the door. When the man failed to recognize the petitioner he attempted to shut the door, but the petitioner prevented this by placing his foot in the door.

The petitioner forced his way into the house and knocked the old man down. He told the man and his wife not to move or else he would shoot them. After robbing them of a handgun and some money, which he found under a mattress, he went to the kitchen where he got a butcher knife and some other knives. He returned to the room where his victims waited and told the old man that he was going to cut off his head. The old man was staring at the petitioner when he, the petitioner, stuck the butcher knife into the old man's neck and began to cut around his throat. Seeing this, the wife ran into the kitchen where she fainted, after running into a table. The petitioner pursued her and, as she lay on the floor, started to decapitate her. Before finishing, however, he returned to the old man's body and finished decapitating him. Michael and Dora Wallace were dead.

The petitioner then went to the basement where he smoked a cigarette, loosened a gas pipe and set the house afire. Finally, he left the house with the proceeds of the robbery, the butcher knife used to kill the Wallaces and Mr. Wallace's head. He later threw the head away and went to his mother's house. (R. 412-416).

Detective Miller, who had no prior knowledge of the Wallace killings, did not then question the petitioner about his confession. Rather, he contacted Richard Stone, a detective from the East St. Louis Police Department, and advised him of its contents. Detective Stone was asked to assist in corroborating the confession because he had initially investigated the Wallace murders. Detective Stone was unable to assist Detective Miller because he was involved in other investigations. However, he did provide Detective Miller with the details to the Wallace crime scene. (R. 377).

After obtaining this information from Detective Stone regarding the Wallace killings Detective Miller interviewed the petitioner to further corroborate his confession. As a result of this interview, Detective Miller's information that there was a small brown dog in the Wallace residence and that the handgun that was taken was a .32 caliber revolver was corroborated. (R. 378, 396-397, 398).

In addition, the petitioner also arranged to have an unidentified female deliver the butcher knife used in the

killings to Detective Miller. (R. 378-379). The knife was subsequently identified by the victims' son as one of his father's butcher knives. (R. 398-399). Finally, the testimony of witnesses present at the crime scene fully corroborated the petitioner's confession. (R. 382-391, 392-397).

Lastly, Mr. Wallace's skull which the petitioner had taken with him after setting the house afire, was found approximately one week later and positively identified by a tooth and jawbone fragment found at the scene. (R. 389).

THE SENTENCING HEARING

As stated, on June 8, 1979, petitioner was indicted by the St. Clair County, Illinois Grand Jury for the April 30, 1979 murders of Richard Stoltz, Samuel Nersesian and Debra Brown. In addition, he was indicted for three counts of armed robbery and three counts of armed violence involving these murder victims. (C. 19-23).

On August 23, 1979, the petitioner pleaded guilty to the three murder charges. (C. 58-83). The State's Attorney requested a separate sentencing hearing for the purpose of imposing the death penalty. The petitioner elected to have a jury sentence him.

On April 14, 1980, a jury was empanelled to sentence the petitioner. On April 15, 1980, after reading the

transcript of his guilty plea, the jury returned a verdict and unanimously found that the petitioner had attained the age of 18 or more at the time that he committed the offense of murder. (R. 338). Further, they unanimously found, beyond a reasonable doubt, that the petitioner had been convicted of murdering two or more individuals. (R. 338); Ill. Rev. Stat. 1980, ch. 38, §9-1(b)(3). The cause then proceeded to the aggravation and mitigation phase. (R. 339); Ill. Rev. Stat. 1980, ch. 38, §9-1(c),(d),(g).

In aggravation, the State's Attorney presented evidence that the petitioner had a significant history of criminal activity. Ill. Rev. Stat. 1980, ch. 38, §9-1(c)(e). This evidence included his juvenile history as well as his adult history. This history showed petitioner's involvement in thefts, burglaries, armed robberies, attempt murder, probation and parole violations, and disciplinary violations while he was incarcerated. (R. 353-368). Additionally, a psychiatric evaluation of the petitioner, prepared before he was released on parole in October, 1978, found that he "has aggressive tendencies, low frustration tolerance, high impulsivity, very poor delaying mechanism, and a total inability to channel his aggression into constructive aspects of life." (R. 367). The evaluation concluded that "[t]his is a street wise, institution wise individual with considerable sociopathic tendencies in him." (R. 367).

Finally, the State's Attorney presented evidence of the Wallace killings and read the petitioner's confession to the jury. (R. 373-400, 412-416).

The petitioner presented no evidence in mitigation. (R. 416).

After being instructed by the judge, the jury retired to deliberate their verdict. They returned a verdict finding that there was no sufficiently mitigating factors present to preclude imposition of the death sentence upon the petitioner. (R. 443).

The judge, pursuant to the verdict and statute, sentenced the petitioner to death for the murders of Richard Stoltz, Samuel Nersesian and Debra Brown. (R. 444-446); Ill. Rev. Stat. 1980, ch. 38, §9-1(g).

The sentences were stayed pending direct review by the Illinois Supreme Court. (R. 444-446); Ill. Rev. Stat. 1980, ch. 38, §9-1(i).

On December 17, 1982, and after a careful review, the Illinois Supreme Court found no reversible error and affirmed the sentences of death imposed for the murders of Samuel Nersesian and Debra Brown.

However, the sentence of death imposed for the murder of Richard Stoltz was vacated and that cause remanded

for the imposition of a sentence other than death. This action was taken pursuant to this Court's holding in Enmund v. Florida, ____ U.S. ____, 102 S.Ct. 3368 (1982).

This petition for a writ of certiorari followed the Illinois Supreme Court's denial of petitioner's petition for rehearing.

REASONS FOR DENYING THE WRIT

I. THE ILLINOIS DEATH PENALTY STATUTE PROVIDES THE SENTENCING AUTHORITY WITH CONSTITUTIONALLY SOUND GUIDELINES IN DECIDING WHETHER TO IMPOSE THE DEATH SENTENCE.

The petitioner claims that the Illinois statute providing for the imposition of the death penalty in certain cases of murder does not contain sufficient guidelines to enable a jury to properly determine when the death penalty may be imposed. In arguing this contention, the petitioner urges that if the sentencing authority literally followed the section of the statute that requires it to impose the death penalty if it unanimously finds that there are no mitigating factors sufficient to preclude the imposition of the death sentence, then it would necessarily be required to impose the death penalty unless the defendant presented a complete defense to the aggravating factors. He concludes that this standard, while seeking to avoid capricious and arbitrary sentencing, actually fosters such sentencing. The respondent submits that the statutory provisions requiring the examination of specific factors that argue in favor of or against the imposition of the death penalty suitably direct and limit the discretion of the sentencing authority so as to minimize the risk of wholly arbitrary and capricious action.

The Illinois Death Penalty Act establishes a bifurcated procedure to be followed in cases where the State's

Attorney requests imposition of capital punishment on a defendant convicted of murder. Ill. Rev. Stat., 1980, ch. 38, §9-1, et seq. This two-step procedure, endorsed by this Court in Gregg v. Georgia, 428 U.S. 153 (1976), requires that the trier of fact first decide the issue of guilt or innocence. After a defendant is convicted of murder and the State requests a death penalty hearing, the sentencing procedure requires the State to prove the existence of any of the enumerated aggravating factors, by competent evidence and beyond a reasonable doubt. Ill. Rev. Stat., 1980, ch. 38, §9-1(b),(e),(f). If the State succeeds in proving the existence of any of the aggravating factors, the sentencing authority must then consider any aggravating and any mitigating factors relevant to the determination of whether to impose the death penalty. Ill. Rev. Stat., 1980, ch. 38, §9-1(c). Once presented, in order to impose the death penalty, the sentencing authority must unanimously find that no mitigating factors are sufficient to preclude the imposition of the death penalty. Ill. Rev. Stat., 1980, ch. 38, §9-1(g),(h). If capital punishment is ordered the defendant receives an automatic appeal to the Supreme Court of Illinois.

Sections 9-1(b) and (f) clearly establish specific guidelines for the sentencing authority to follow in deciding whether the defendant is properly qualified for

the death penalty. The State is required to establish, beyond a reasonable doubt, that the defendant committed an act which brings his or her conduct within at least one of the seven enumerated aggravating factors. The sentencing authority thus may not even consider imposing capital punishment under section 9-1 unless and until the State meets its traditional burden of proof. By precisely limiting the types of criminal conduct which may be subject to capital punishment, and by forbidding capital punishment unless such conduct is established beyond a reasonable doubt, section 9-1 fulfills the constitutional requirement that the sentencing authority have specific standards to follow in determining that class of cases in which the death penalty will be available. Gregg v. Georgia, 428 U.S. 153, 189, 197, 96 S.Ct. 2909 (1976); Zant v. Stephens, 33 Cr. L. 3195 (June 22, 1983).

The petitioner contests the constitutionality of the second stage of the proceedings. Specifically, he challenges the manner in which mitigating and aggravating factors are weighed in the actual death penalty hearing. If the sentencing authority unanimously finds the existence of at least one statutorily recognized aggravating factor, the defendant is then a candidate for the death penalty. Then, and only then, does the sentencing proceeding progress to the aggravation and mitigation stage. The Act states that

the sentencing authority shall consider any mitigating factors which are relevant to the imposition of the death penalty. It sets forth certain specific factors, including circumstances ot the defendant and of the crime, and prescribes that the mitigating factors to be considered "may include but need not be limited to" those thus delineated. Ill. Rev. Stat., 1980, ch. 38, §9-1(c). It further provides that any information relevant to the mitigating factors may be presented regardless of its normal admissibility under the rules of evidence, and that the defendant may rebut the evidence presented by the State. Ill. Rev. Stat., 1980, ch. 38, §9-1(e). A procedure by which a defendant could more completely enlighten the sentencing authority concerning his "individual circumstances" and "individual characteristics" is difficult to imagine.

As recognized by the Illinois Supreme Court, the preclusion of the death penalty does not require a complete defense to the aggravating factors. Petitioner's EXHIBIT A at 4. The Illinois Supreme Court recognized that a balancing process was required. This Court's opinion in Jarek v. Texas, 428 U.S. 262 (1976) makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required. More recently, in commenting on the balancing process, this Court stated:

> This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths. Adams v. Texas, 418 U.S. 38, 47 (1980).

Just last month this Court emphasized that "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 33 Cr.L. 3195, 3200 (June 22, 1983) (emphasis in original).

In the present case, all of the evidence presented at the second stage was offered by the prosecution in aggravation. The record reveals that petitioner was afforded a full and fair opportunity to present to the sentencing jury any information he deemed potentially helpful to his cause. He declined all offers, including his right of allocution. R. 416. The jury instructions outlined the law on the weighing process to be conducted between aggravating and mitigating factors. R. 438-440. The jury's verdict directing the judge to impose the death sentence on the petitioner indicated the absence of mitigating factors sufficient to preclude the sentence of death. R. 443.

The petitioner's failure to provide any mitigating input into the weighing process largely accounts for the verdict that was reached. This failure, coupled with the overwhelming evidence in aggravation, makes a contrary verdict

difficult to perceive. The petitioner's failure to present any evidence in mitigation left the jury little, if anything, to balance. Under the circumstances of this case, it cannot be said that the verdict was arbitrary or capricious.

Petitioner also argues that section 9-1(e) of the Illinois Death Penalty Act, which allows evidence to be admitted regardless of its admissibility under the rules of evidence governing criminal trials, sets no standard for guidance for the sentencing authority or the attorneys. Respondent submits that the Act provides sufficient guidance under the previous decisions of this Court.

In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the Georgia statutory scheme providing the imposition of the death penalty under certain circumstances did not offend the Eighth and Fourteenth Amendments to the United States Constitution. In reaching its decision, the Court discussed the advantage of a bifurcated proceeding where the question of sentence is not considered until after the determination of guilt has been made.

One of the advantages the Court noted was that:

> [m]uch of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question. 428 U.S. at 191.

Then, citing its earlier decision in United States v. Bruton, 391 U.S. 340 (1968), which had held inadmissible against a defendant at trial on the criminal charge a co-defendant's confession, the Court noted that in other situations it had concluded that a jury cannot be expected to consider certain evidence before it on one issue, but not on another. id., nt. 40. The court then concluded that concerns that the death penalty not be imposed in an arbitrary and capricious manner can best be met by a system that provides for a bifurcated proceeding,

> at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. 428 U.S. at 196.

The same day that it decided Gregg, the Court announced its opinion in Woodson v. North Carolina, 428 U.S. 280 (1976). In Woodson, the Court held that the fundamental respect for humanity underlying the Eighth Amendment requires:

> consideration of the character and the record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death. 428 U.S. at 305.

Two years later, in Lockett v. Ohio, 438 U.S. 586 (1978), in invalidating the Ohio death penalty statute the Court stated that "we cannot avoid the conclusion that an individualized decision is essential in capital cases. 438 U.S. at 606. Noting that in Woodson it had not attempted

to indicate what facets of an offender or his offense were relevant in "capital sentencing", the Court held that the:

> sentencer in all but the rarest kind of capital case, not be precluded from consideration, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. 438 U.S. at 605.

In accord with the dictates of Gregg, Woodson, and Lockett, the Illinois Death Penalty Act provides for the presentation in aggravation and mitigation of any evidence that relates to defendant's character, prior record and the circumstances of his offense. The statute does not discriminate between the parties; it affords both the State and the defendant equal opportunities to present and rebut such information as is relevant to fully inform the sentencing jury about the offense and the defendant. By allowing the sentencing authority to consider any relevant evidence, the respondent has protected the petitioner and similarly situated defendants from the arbitrary and capricious imposition of the death sentence. Lockett v. Ohio, 438 U.S. at 607; Gregg, 428 U.S. at 196-97. The foundation of this statutory provision is constitutionally sound and petitioner's argument must be rejected outright.

In light of the foregoing, the respondent submits that the Illinois Supreme Court was correct in holding that the Illinois Death Penalty Act provides the sentencing authority with constitutionally sound guidelines in deciding whether to impose the death sentence, and respectfully requests that this Court deny petitioner's petition as to this claim.

II. BARCLAY v. FLORIDA, 463 U.S. ___ (1983) PERMITS FACTORS NOT SPECIFICALLY SPELLED OUT IN A STATE'S DEATH PENALTY LAW TO BE CONSIDERED AS REASONS FOR IMPOSING THE DEATH SENTENCE.

Petitioner urges this Court to grant certiorari to resolve the question pending before this Court in Barclay v. Florida, 81-6908, of whether the Eighth Amendment bar on unguided discretion in capital cases is violated by a sentencing scheme that allows statutorily undefined aggravating factors to be considered as reasons for imposing death. Subsequent to the filing of the petition for writ of certiorari, this Court rendered its decision in Barclay. The Court ruled in the case of a Florida man, sentenced to die for trying to start a race war through random murder, that it is not necessarily unconstitutional for a convicted murderer to be sentenced to death based in part on factors not specifically spelled out in a State's death penalty

law. Barclay v. Florida, 463 U.S. ___ (July 6, 1983). In light of this decision, the respondent submits that the petitioner's second issue fails to present a viable reason for review by this Court and urges the denial of the petition with respect to this issue.

CONCLUSION

For the foregoing reasons, the respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

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